Petition

81-1474

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JAN 22 1982
ALEXANDER L. STEVAS
CLERK

CASE NO:

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

MURPHY COLE, IV,

PETITIONER

V.

STATE OF OHIO,

RESPONDENT

PETITION FOR WRIT OF CERTIORARI

TO THE COURT OF APPEALS

OF FRANKLIN COUNTY, OHIO

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OF AMERICA

QUESTIONED PRESENTED

THE COMMON PRACTICE IN OHIO OF CHARGING THE JURIES IN CRIMINAL CASES THAT "IF AFTER A FULL AND IMPARTIAL CONSIDERATION OF ALL THE EVIDENCE, YOU ARE FIRMLY CONVINCED OF THE TRUTH OF THE CHARGE, THE STATE HAS PROVED ITS CASE BEYOND A REASONABLE DOUBT" DEPRIVES OHIO DEFENDANTS OF DUE PROCESS OF LAW.

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OFFICIAL AND UNOFFICIAL REPORTS

No Official reports of the opinion in this case have been published. The opinion is published unofficially as State v. Murphy Cole, No. 80AP-920 (Ct. App. 10th Dis. August 27, 1981).

GROUNDS FOR JURISDICTION

The Tenth District Court of Appeals for the State of Ohio rendered an opinion on the merits of this action on August 27, 1981. On November 25, 1981 the Supreme Court of Ohio rendered a decision refusing to accept the action for review. Petitioner respectfully requests review pursuant to 28 U.S.C. §1257 (3).

CONSTITUTIONAL AND STATUTORY PROVISIONS

14TH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

> ...Nor shall any State deprive any person of life, liberty, or property, without due process of law;...

Section 2901.05 (D) of the Ohio Revised Code (Pages, 1974)

> (D)"Reasonable doubt" is presented when the jurors, after they have carefully considered and compared all the evidence, cannot say they are firmly convinced of the truth of the charge. It is a doubt based on reason and common sense. Reasonable doubt is not mere possible doubt, because everything relating to human affairs or depending on moral evidence is open to some possible or imaginary doubt. "Proof beyond a reasonable doubt" is proof

of such character that an ordinary person would be willing to rely and act upon it in the most important of his own affairs.

STATEMENT OF THE CASE

In August of 1980 Petitioner Murphy Cole, IV and one Buster Harris were acquaintances who lived across the street from each other in Columbus, Ohio. The two men occasionally drank together. On August 8, 1980 a disagreement between the two occurred, apparently over Buster Harris' refusal to make an equal contribution toward the beer being consumed. Harris physically ejected Cole from Harris' residence and slashed Cole with a switchblade knife, virtually cutting his ear in half and cutting open his face. In fleeing Harris' apartment Petitioner Cole left his car keys, apartment keys and a cigarette lighter.

Petitioner fled first to his apartment and then walked (his car being unavailable under the circumstances) to

a Columbus hospital where he received treatment for his wounds. Petitioner then returned home and stayed at home or close to it until Sunday night when he called in sick to his employment. On Monday morning he went to the police station to attempt to file criminal charges. The Columbus Police Department referred him to the Columbus City Attorney's Office. The matter was apparently put on hold until Mr. Cole could provide Buster's full name and address.

After leaving the City Attorney's Office Mr. Cole took a cab to a gun shop, where he purchased a gun for his own protection and returned home. Once home he was still in fear of Buster Harris and in need of his (Murphy Cole's) car keys so he could get to work and to his classes at Ohio State University where he was a full-time student. Petitioner decided to call the police again and to inquire as to whether he could go to Buster's apartment and ask

for his keys and lighter back. The police informed him that he had every legal right to do so. Mr. Cole then went back to his apartment, acquired his gun, now loaded, and went across the street to Buster's apartment.

When Murphy Cole knocked on the door, a friend of Buster's by the name of Michael Angel looked out of the window and saw him. Angel then summoned Buster, who looked out of the door and saw Cole. Buster then went back into his bedroom and got a cut-off pool cue. Buster answered the door with the cue in hand with the words "What do you want, M _ _ _ _ _ F _ _ _ _ _?"

Murphy responded "I want my keys".

Harris then came out of the door raising the cue over his head as if to strike the Petitioner. Cole pulled his gun out from behind his back and began firing. Harris turned and ran back into his apartment, followed by Cole who continued firing until the gun was empty. Cole then fled

the apartment and ran back to his own apartment building where he told a neighbor to call the police. Cole waited at the street for the police to arrive.

Some time later Buster Harris died from one of the gunshot wounds inflicted upon him. Pictures taken by the Crime Scene Search Unit of the Columbus Police Department showed Murphy Cole's keys sitting on Harris' stereo by the front door and the pool cue lying in the living room where Buster left it. A sizable knife was found in Buster's pants pocket. A gun which Cole had earlier seen in Buster's possession was not recovered from Buster's bedroom where Buster died.

Petitioner was originally charged with the purposeful killing of Buster Harris with prior calculation and design (aggravated murder). The jury convicted Petitioner of the purposeful killing of Harris (murder) as opposed to a manslaughter conviction or an acquittal based upon self-defense.

Prior to the jury beginning deliberations the Petitioner, through counsel, objected to the reading to the jury of the following portion of Ohio Jury Instructions.

> "If after a full and impartial consideration of all the evidence, you are firmly convinced of the truth of the charge, the State has proved its case beyond a reasonable doubt. If you are not firmly convinced of the truth of the charge, you must find the Defendant not guilty." 4 O.J.I. Criminal, §403.50 (2) "Reasonable Doubt" (Anderson, 1981)

Petitioner specifically objected that this charge lowered the standard for proof beyond a reasonable doubt and deprived the Petitioner of due process of law in violation of the 5th and 14th Amendments to the Constitution of the United States. The trial court refused to modify or correct the charge. The objections are set forth at pages 305 and 306 of the Transcript of Proceedings in the case.

Petitioner pursued his objections before the Court of Appeals for the Tenth

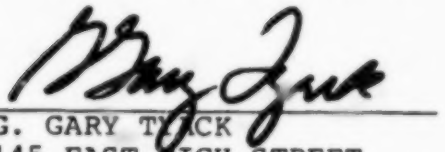
Appellate District of Ohio. When that court affirmed, the issue was raised for review by the Supreme Court of Ohio. The Supreme Court of Ohio refused to address the issue on the merits, despite the fact that virtually every criminal defendant in Ohio is having his guilt or innocence determined by the "firmly convinced" standard.

ARGUMENT

Ohio, through enactment of §2901.05 of the Ohio Revised Code set forth above and through its standard jury instructions (Ohio Jury Instructions) has substituted a standard of "firmly convinced" for "proof beyond a reasonable doubt" in criminal cases. This change of the requirements for a criminal conviction flies in the face of a number of decisions of this Honorable Court in the area of due process of law, notably In Re Winship, (1970), 397 U.S. 358.

Although arguably §2901.05 of the Ohio Revised Code has passed muster in Holland v. United States (1954), 348 U.S. 121 the whole key to the Holland decision was that the charge on "reasonable doubt" taken as a whole would not "mislead the jury into finding no reasonable doubt when in fact there was some. "Holland v. United States, idem at page 140. Ohio has taken one questionable part of the Holland charge and amplified that part into the whole charge of proof beyond a reasonable doubt. This amplification lowers the constitutionally mandated standard of proof and deprives Ohio Defendants of due process. Full review by this Honorable Court before this standard of proof is applied to defendants under Ohio's newly-enacted death penalty would be a true blessing to all involved in the criminal justice system of Ohio and other states who might adobt this standard of proof.

Respectfully submitted,



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IN THE COURT OF APPEALS

OF FRANKLIN COUNTY, OHIO

STATE OF OHIO, :

Plaintiff-Appellee, :

v. : No. 80AP-920

MURPHY COLE, :

Defendant-Appellant :

D E C I S I O N

Rendered on August 27, 1981

WHITESIDE, J.

Defendant appeals from his conviction of murder in the Franklin County Court of Common Pleas and raises three assignments of error as follows:

> "1. The trial court erred in excluding from the jury's consideration the exhibit evidence as to the decedent's criminal record (Exhibits C, D, & H).
>
> "2. The trial court erred in overruling the defendant-appellant's motions for judgment of acquittal as to the charges of aggravated murder and murder.
>
> "3. The trial court erred in defining proof beyond a reasonable doubt as being 'firmly convinced of the truth

of the charge.'"

In this case, there is no dispute but that defendant shot and killed the victim, the issues raised being whether defendant acted in self-defense and, if not, the degree of homicide involved. Defendant was charged and tried for aggravated murder, but the jury returned a verdict of guilty of the lesser-included offense of murder. Defendant contends that the highest degree of homicide of which he could properly be convicted would be voluntary manslaughter.

This is the issue raised by the second assignment of error, namely, whether the evidence permitted submission to the jury of the charges of aggravated murder and murder. Predicated upon defendant's own testimony, we conclude that there was sufficient evidence to submit these charges.

Defendant and the victim were social acquaintenances. On a Friday evening at

the victim's residence, the two got into an argument over who was paying for the beer they were drinking. As a result, the victim ejected defendant from the residence and attacked him with a knife which slit defendant's ear and cut his face. In his hurried exit from the victim's residence, defendant left behind his car keys, apartment keys and a cigarette lighter.

Defendant went to Doctor's Hospital and obtained some treatment for his wounds and then returned to his own apartment. He called in sick to his place of employment on Sunday evening. After a period of meditation as to what to do, defendant on Monday morning went to the police station to file criminal charges against the victim and was referred to the City Attorney's Office where he talked to an intern and in turn was referred to the night prosecutor's program, although a statement was taken from him at that

time. Still in fear of the victim, defendant purchased a gun for his protection. Then he called the police again and inquired as to whether it was proper for him to go back to the victim's apartment to obtain his keys and lighter and was informed that he had a right to do so. Accordingly, on Monday afternoon defendant, armed with a loaded gun, went to the victim's apartment and asked for his keys. The victim was holding a cue stick, which he raised over his head as if to strike defendant, who then pulled his gun and shot the victim. The victim turned and ran back into the apartment, followed by defendant who continued to fire the gun at the victim until it was empty. Defendant indicated that he was afraid that the victim was going back into the apartment to obtain his own gun.

Defendant described the incident at the apartment as follows (Tr. 206):

"I went ahead, and I remember making the statement twice, 'Buster, I want my keys.'

"When he came to the door with the pool stick, his statement to me was something to the effect of come and get them. It was something like come and get them.

"From that point on, Buster had the pool stick in his right hand. What he did was he came at me with the pool stick. He raised it over his right shoulder.

"He was in the process of bringing it down when I pulled the gun and I shot him."

Defendant also described what occurred subsequently, as follows (Tr. 207-208):

"Q. Describe briefly what occurred after this first shot, and what when on.

"A. I believe I had maybe been watching a little too much TV.***

"I thought there would be a reaction. At least a lot of people fall down, a lot of people draw back and maybe grimace in pain, or something.

"I went ahead and pulled the gun. When I went ahead and shot, Buster showed no such reaction.

"I assumed apparently that since I wasn't very good at handling handguns --I had heard stories about bullets that maybe you can hold like a .22 six feet away, and the bullet will

go right and/or left.

"I went ahead and assumed for the most part basically that I missed Buster. From that point after, I went ahead and shot Buster. I went ahead and turned around and entered his apartment again.

"From that point on, I went in the apartment. I went in behind Buster, and I remember holding the gun with both hands, and I remember firing."

Defendant explained his reason for following the victim into the apartment rather than fleeing, as follows (Tr. 209):

"Q. What were your thoughts when you saw Buster turn around apparently unarmed, and run back into the apartment?

"A. When he was going back to the bedroom, I knew he was going to get his magnum.

"Q. What did you know was going to happen to you?

"A. The magnum is a very big gun. I knew he would shoot me with the magnum.

"Q. So you followed him into the interior of the apartment?

"A. Yes, I did.

"Q. And firing all the time?

"A. Yes, I did.

"Q. Then you stopped firing when you ran out of bullets and ran?

"A. Right. * * *

"* * *

"At that point in time, I was no longer interested in trying to stop him from getting to the magnum.

"When he reached the closet, and opened it up, I just went ahead and turned and ran."

From the totality of the evidence, the jury could have reasonable reached the conclusion that defendant procured the gun and went to the victim's apartment planning to kill him in revenge for the attack by the victim upon defendant several days previously. There is ample evidence of prior calculation and design. By defendant's own admission, he mediated for two days as to what to do and then contacted the police. By defendant's own admission, his contacting the police on both occasions was part of a plan and design on his part. Defendant contented, however, that the plan and design was only

to protect himself and to obtain back his keys and lighter. While it was proper for the trial court to submit the issue to the jury, if found in defendant's favor upon the issue of prior calculation and design, instead finding a purposeful killing not committed with prior calculation and design since it found him not guilty of aggravated murder.

The evidence supports a finding of a purposeful killing, even accepting defendant's story that he originally went to the victim's apartment to obtain his car keys and armed himself with a gun only for defensive reasons. Defendant in effect admitted that he purposely killed the victim. Such purpose may be inferred from his use of the deadly weapon. It is fortified by the fact that defendant not only shot the victim when he allegedly attempted to hit defendant with the pool stick but, after the victim

turned and went back into the apartment, defendant followed him and shot the victim several more times.

Defendant contends that the highest degree of homicide of which he could be found guilty is voluntary manslaughter in violation of R.C. 2903.03 (A), which provides that:

> "No person, while under extreme emotional stress brought on by serious provocation reasonably sufficient to incite him into using deadly force, shall knowingly cause the death of another."

There are two reasons why defendant's contention is without merit. First, R.C. 2903.02(A) defining murder provides that: "No person shall purposely cause the death of another." Reading the two sections together, if the State proves beyond a reasonable doubt that the defendant purposely caused the death of another, he is guilty of murder, irrespective of whether he acted under extreme emotional stress as set forth

in R. C. 2903.03, since the culpable mental state involved for voluntary manslaughter under that section is only knowingly. In other words, there was sufficient evidence to permit the jury to find beyond a reasonable doubt that the defendant caused the death of the victim "purposely," rather than only "knowingly." Purposely as used herein is defined by R.C. 2901.22(A) as a "specific intention to cause a certain result." On the other hand, as defined by R.C. 2901.22(B), "a person acts knowingly, regardless of his purpose, when he is aware that his acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature." In other words, for a homicide to be purposeful, the accused must specifically intend to kill the victim. If he does so, the crime is murder. On the other hand, if the defendant does not have a specific intent to kill but knows that his conduct

will probably cause the death of the victim, then he acts knowingly. Thus, the trial court did not err in submitting the crime of murder to the jury.

While the case was submitted to the jury in this fashion without objection by defendant as to the instructions given by the trial court in this regard, defendant contends that the trial court erred in refusing to remove the crime of murder from the jury's consideration. While not specifically cited, apparently defendant relies upon State v. Muscatello (1978) 55 Ohio St. 2d 201, which holds that extreme emotional stress as defined in R.C. 2903.03 is not an element of the crime of voluntary manslaughter but, rather, is a circumstance which mitigates the criminal culpability of the defendant. We recognize that the foregoing discussion of the distinction between murder and voluntary manslaughter could be argued to be inconsistent with Muscatello.

Assuming this to be the case, and that the existence of extreme emotional stress reduces the degree of the homicide even though the State has proved beyond a reasonable doubt that the defendant purposely caused the death of another, the result herein does not vary.

First, as noted above, there was no objection to the trial court's charge in this regard. Secondly, the evidence is such that the jury could reasonably find that defendant did not act under extreme emotional stress provoked by the victim. Thirdly, nearly three days ensued between the attack on defendant and the killing. Fourthly, defendant admittedly fully planned his return to the victim's apartment to obtain his keys. In addition, even when his efforts at obtaining his keys were unsuccessful, and the victim attempted to strike him with a pool stick, defendant, rather than leaving, pursued the victim into the apartment and held the gun with

both hands and fired it at the victim. In addition, the attorney, who as a legal intern had interviewed defendant at the City Attorney's Office a few hours before the murder, testified that she "was impressed with the fact he was very calm." (Tr. 226.)

Accordingly, we find no error in the submission to the jury of the crimes of aggravated murder and murder, and the second assignment or error is not well taken.

By the first assignment or error, defendant contends that the trial court erred in excluding defendant's exhibits C, D, and H. These exhibits consisted generally of the arrest record of the victim. Defendant contends that these records were admissible to show the violent nature of the victim in support of defendant's claim of self-defense. The record included some convictions for assault.

Whether to admit such records into evidence lies within the sound discretion of the trial court. Here, we find no abuse of discretion demonstrated. While defendant sought to introduce the victim's arrest record, there is no indication that defendant himself knew or was aware of this record or reacted to it either in connection with his claim of self-defense or extreme emotional stress. On the other hand, the evidence did indicate that the vitcim could, and did on occasion, act violently, evinced by the undisputed evidence of the somewhat vicious assault upon defendant.

The jury did not accept the State's case in toto but, instead, found defendant not guilty of aggravated murder, that is found a reasonable doubt as to whether defendant acted with prior calculations and design. Thus, the jury did accept to some extent defendant's contention that he went to the victim's apartment armed with a gun because of fear for his

own safety. It is what transpired at the apartment resulting in the killing that is essential at this stage of the case. Defendant's testimony was corroborated in part by the State's evidence, including the eyewitness testimony of a neighbor that the victim in fact did take a cue stick with him when he answered the door, knowing at the time that defendant was the person at the door. However, we find no abuse of discretion in the exclusion of the three exhibits consisting of the prior criminal record of the victim, the trial court acting properly within the bounds of the discretion vested in it. We find no prejudicial error. The first assignment of error is not well taken.

By the third assignment of error, defendant contends that the trial court erred in failing to give a requested instruction that reasonable doubt is present only when the jury is "firmly convinced." In effect, defendant

desired the prior statutory definition of reasonable doubt to be given to the jury, rather than the present one as set forth in R. C. 2901.05, which has been found constitutional by the Ohio Supreme Court in State v. Nabozny (1978) 54 Ohio St. 2d 195, and State v. Cotton (1978) 56 Ohio St. 2d 8. Accordingly, the third assignment of error is not well taken since to rule in defendant's favor would be inconsistent with those Supreme Court decisions.

For the foregoing reasons, all three assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

REILLY and McCORMAC, JJ., concur.

IN THE COURT OF APPEALS

OF FRANKLIN COUNTY, OHIO

STATE OF OHIO, :

Plaintiff-Appellee, :

v. : No. 80AP-920

MURPHY COLE, :

Defendant-Appellant. :

JOURNAL ENTRY OF JUDGMENT

For the reasons stated in the decision of this court rendered herein on August 27, 1981, the assignments of error are overruled, and it is the judgment and order of this court that the judgment of the Franklin County Court of Common Pleas is affirmed.

WHITESIDE, REILLY & McCORMAC, JJ.

By _____
JUDGE ALBA L. WHITESIDE s/

cc: Karen L. Martin
G. Gary Tyack

Filed: August 27, 1981 at 4:16 P.M.

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO, 1981 Term

City of Columbus. To wit: November 25,1981

State of Ohio,

Appellee, No. 81-1502

vs. MOTION FOR LEAVE TO

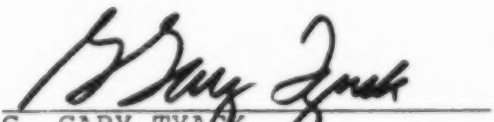
Murphy Cole, APPEAL FROM THE COURT

Appellant. OF APPEALS FOR FRANKLIN COUNTY

It is ordered by the Court that this motion is overruled.

CERTIFICATE OF SERVICE

This will hereby certify that all parties to be served have been served. The Office of the Prosecuting Attorney for Franklin County, Ohio was served with the re-printed Petition for Certiorari by hand delivery this 5th day of February, 1982.



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Opposition

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OCTOBER TERM OF 1981

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Petitioner,

v.

THE STATE OF OHIO,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

WHETHER AN INSTRUCTION TO THE JURY IN A CRIMINAL CASE WHICH INCLUDES A DEFINITION THAT PROOF BEYOND A REASONABLE DOUBT IS PROOF OF SUCH CHARACTER THAT AN ORDINARY PERSON WOULD BE WILLING TO RELY AND ACT UPON IT IN THE MOST IMPORTANT OF HIS OWN AFFAIRS CORRECTLY CONVEYS THE CONCEPT OF REASONABLE DOUBT TO THE JURY.

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OPINIONS BELOW

The opinions below are adequately set forth in the petition.

JURISDICTION

Jurisdiction is adequately set forth in the petition.

CONSTITUTIONAL AND STATUATORY PROVISIONS

Section 2901.05 (D), Ohio Revised Code, and the relevant portion of the Fourteenth Amendment to the Constitution are adequately set forth in the petition.

STATEMENT OF THE CASE

Petitioner was indicted by a Franklin County, Ohio grand jury for one count of aggravated murder by prior calculation and design in connection with the shooting death of Buster Harris. A jury trial commenced on October 27, 1980.

The homicide occurred on August 11, 1980, at the victim's apartment in Columbus, Ohio. A witness, Michael Angel, testified that he was present in Harris' apartment when petitioner knocked on the door. Buster went to the bedroom, got a pool cue about two feet long, and opened the door. Mr. Angel then observed petitioner firing a gun while pursuing Buster into the bedroom.

The victim's body was discovered in the bedroom closet. A folded knife was found in the victim's pants pocket. The autopsy revealed six bullet wounds, and all the shots were fired from more than two or three feet away. Ballistics testimony indicated that bullets found at the scene and taken fron the victim's body were fired from the .38 caliber revolver with six spent rounds found in petitioner's waistband at the time of his arrest near the scene. The cause of death was internal bleeding from the bullet which passed through the right lung.

Petitioner when arrested told the police that he went to Buster's apartment to obtain his keys and that Buster charged off the porch at him with the pool cue. He denied entering the apartment that day. At trial, petitioner testified that on August 8, 1980, he had a dispute with Buster, during which Buster cut his ear with a knife and threatened to kill him. Petitioner fled, leaving his keys in the apartment. Petitioner further stated that upon being told by the police that he could legally ask Buster for his keys, he purchased a .38 handgun and went with the loaded gun to Buster's apartment. According to peti-

tioner, Buster came toward him with a pool cue, and petitioner shot him, then followed him into the apartment. Petitioner then returned to his own apartment and asked a neighbor to call the police.

The trial court included in the instructions to the jury all of the definitions of reasonable doubt contained in Section 2901.05 (D), Ohio Revised Code, set forth at page three of the petition.

The jury returned a verdict of not guilty of aggravated murder but guilty of the lesser included offense of murder, purposely causing the death of Buster Harris. Petitioner pursued a direct appeal of his conviction, and the Court of Appeals for Franklin County, Ohio, in a unanimous decision rendered on August 27, 1981, affirmed the judgment of the trial court. Further review was denied by the Ohio Supreme Court.

SUMMARY OF ARGUMENT

The instruction given by the trial court was taken from the statutory definition of reasonable doubt found in Section 2901.05, Ohio Revised Code. Decisions of this Court and of the Ohio Supreme Court indicate that the instruction on reasonable doubt given by the trial court, when considered as a whole, sufficiently conveyed the concept of reasonable doubt to the jury.

REASONS FOR DENYING THE WRIT

Instructions to a jury must be viewed as a whole, not in isolation. *State v. Price*, 60 Ohio St. 2d 136 (1979); *Cupp v. Naughton*, 414 U. S. 141 (1973). When viewed in its entirety, the definition of reasonable doubt contained in Section 2901.05, Ohio Revised Code, correctly conveys the concept of reasonable doubt to the jury.

Respondent notes the decisions of this Court in *Hopt v. People of Utah*, 120 U.S. 430 (1887) and *Holland v. United States*, 348 U.S. 121 (1956). In *Hopt v. People*, *supra.*, at 439, this Court stated:

> "It is difficult to conceive what amount of conviction would leave the mind of a juror free from reasonable doubt if it be not one which is so settled and fixed as to control his actions in the more weighty and important matters relating to his own affairs."

In *Holland v. United States*, *supra.*, while expressing preference for an instruction employing the phrase

"hesitate to act", this Court concluded that there was no constitutional infirmity in an instruction employing the language "willing to act". The Ohio Supreme Court noted that decision in upholding the Ohio statutory definition of proof beyond a reasonable doubt. *State v. Nabozny*, 54 Ohio St. 2d 195, 202 (1978). The Ohio Supreme Court again upheld the constitutionality of the statute in *State v. Cotton*, 56 Ohio St. 2d 8, 13 (1978).

The use of the phrase "willing to rely", whether over objection or in the absence thereof, has been found not to constitute grounds for reversal of convictions in several decisions of the United States Court of Appeals for various circuits. e.g. *United States v. Emalfarb*, 484 F. 2d 787 (7th Cir., 1973); *United States v. Magnano*, 543 F. 2d 431 (2d Cir., 1976); *United States v. Steinkoenig*, 487 F. 2d 224 (5th Cir., 1973; *United States v. Releford*, 352 F. 2d 36 (6th Cir., 1966);*United States v. Pepe*, 501 F. 2d 1142 (10th Cir.,1974); *United States v. Leaphart*, 513 F 2d 747 (10th Cir., 1978); *United States v. Tobin*, 576 F. 2d 687 (5th Cir.,1978).

A review of the above cited authority reveals that the statutory definition of reasonable doubt contained in Section 2901.05 adequately expresses the concept of reasonable doubt to the jury, and it is respectfully submitted that the Writ of Certiorari should not issue in this case.

CONCLUSION

For the reasons advanced in the foregoing brief of respondent, it is respectfully submitted that the Writ of Certiorari should not issue in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to Rule 28.5 (b) of the Rules of Practice of this Court, I hereby certify that a copy of the foregoing Brief of Respondent in opposition to Certiorari was served upon petitioner, Murphy Cole IV, by forwarding a copy of the brief to the office of his counsel, Mr. G. Gary Tyack, 145 East Rich Street, Columbus, Ohio 43215; by United States mail, postage prepaid, this day of March, 1982. I further certify that all parties requested to be served have been served and that I am a member of the Bar of the Supreme Court of the United States.

ALAN C. TRAVIS
Counsel of Record For Respondent